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EMPLOYMENT SUITS AGAINST INDIAN TRIBES: BALANCING SOVEREIGN RIGHTS AND CIVIL RIGHTS

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I. INTRODUCTION

The proliferation of employment suits in state and federal courts is mirrored in the courts of Indian tribes[1] that employ people in tribal government and commercial enterprises. The employment relationship provides a fertile source of litigation in federal and state courts; not only is it heavily regulated by statute, but numerous common law theories have developed in response to specific adverse employment actions. As sovereign governments, Indian tribes are exempt from most federal and state employment laws.[2] However, employment actions are frequently

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1. Because this article concerns the impact of the Indian Civil Rights Act, 25 U.S.C. § 1301-03 (1988 & Supp. II. 1990), on tribal employment, the definition of "Indian tribe" contained in § 1301 of that Act will be used:

> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices,bodies, and tribunals by and through which they are executed.

Indian Civil Rights Act § 1301. I have also chosen the term "Indian" rather than "Native American" to differentiate between native peoples affected by the statutes and cases discussed here and those who are not, such as Native Hawaiians, who are currently pressing for federal recognition of their sovereign status. The Hawaiian Senate has recently proposed "A Bill for an Act Relating to Hawaiian Sovereignty," S.B. No. 3486, 16th Legis. (1992), a purpose of which is to "call upon the President and the Congress of the United States . . . to re-recognize and assist the re-establishment of a sovereign indigenous Hawaiian government . . . ." "As an initial step," the bill continues, "redress requires recognition of indigenous Hawaiian rights of self-determination to a degree at least equal to those exercised by Indian and Alaskan tribes or nations." S.B. No 3486, at § 3.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988) ("Title VII"), expressly excludes Indian tribes from the definition of "employers" who may not discriminate on the basis of race, color, religion, sex and national origin. Title VII § 2000e(b); *see also* Morton v. Mancari, 417 U.S. 535, 547-48 (1974); Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980). The Americans with Disabilities Act, 42 U.S.C.A. § 12101-12213 (Supp. 1992) ("ADA") also excludes Indian tribes from its definition of "employer." ADA § 12111(5)(B). Although the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (1988) ("ADEA"), contains no such exclusion, *see* ADEA § 630(b), that Act's definition of "employer" has been construed, on the basis of tribal sovereignty, to exclude Indian tribes as well. EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). *But see* Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753 (D. N.D. 1989), which reached a different conclusion as to the amenability of tribes to suits alleging violations of Title VII and the ADEA by *nonmember* employees. In addition, the Labor Management Relations Act, 29 U.S.C. § 141-88 (1988), has been held not to apply to Indian tribes. Roberson v. Confederated Tribes,

brought against Indian tribes under the Indian Civil Rights Act ("ICRA"),[3] which requires tribes, *inter alia,* to afford equal protection and due process rights to people in their employ.[4] In the context of employment, such rights may arise from personnel practices, policies or procedures. Lawsuits against tribes alleging ICRA violations in employment actions are becoming more commonplace.[5]

However, many ICRA suits are dismissed by tribal courts. While this is an effective strategy for eliminating tribal liability, it creates other problems for tribes. With the exception of *habeas corpus* actions, which can be heard in federal courts,[6] tribal courts are generally the only forums available for ICRA claims.[7] In response to ICRA suits against them in tribal courts, some tribes assert the defense of sovereign immunity. Ironically, use of the sovereign immunity defense raises a number of potential threats to tribal sovereignty. Aggrieved tribal employees either find themselves with no forum or one they perceive as biased.[8] Tribal judges criticize the use of the sovereign immunity defense by

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103 L.R.R.M. (BNA) 2749 (1980); Ft. Apache Timber Co., 221 N.L.R.B. Dec. (CCH) 28,872 (1976). The minimum wage and hour laws mandated by the Fair Labor Standards Act, 29 U.S.C. § 201 (1988), were held not to apply to Indian tribes in Martin v. Great Lakes Fish & Wildlife Comm., 61 U.S.L.W. 2262 (D. Wis. Nov. 3, 1992) (application of the law to tribes "would be a significant intrusion into the internal affairs of the tribes and their tribal organization and would impinge upon the tribes' rights of self-governance"). However, courts are divided as to whether the Occupational Safety and Health Act, 29 U.S.C. § 651 (1988) ("OSHA"), applies to tribes. *Compare* Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982) (application of OSHA to tribe would infringe upon tribal sovereignty and right to self-government) *with* U.S. Dept. of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182 (9th Cir. 1991) (tribe's treaty right to exclude non-Indians from reservation did not bar application of OSHA to tribe) and Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (self-government exception to federal regulation only applies to intramural matters; therefore OSHA applies to tribal farm). The Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1988), has also been held applicable to tribes. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989).

Tribal courts are, of course, free to adopt state statutory or common law into their jurisprudence. For example, in a wrongful termination case, the Standing Rock Sioux Tribal Court applied the doctrine of "employment at will," as defined by a North Dakota statute, as well as North Dakota common law, to determine whether a personnel manual creates a contract in Defender v. Bear King, 17 Indian L. Rep. 6078 (Standing Rock Sioux Tribal Ct. 1989). Similarly, the Court of Appeals of the Navajo Nation reasoned that the "American rule" of employment at will governed a wrongful termination action in Davis v. Navajo Tribe, 4 Nav. Rep. 50 (Ct. App. 1983).

3. 25 U.S.C. §§ 1301-03 (1988 & Supp. 1992).

4. *Id.*

5. This article concerns employment suits brought under the ICRA against *tribes* as employers. It does not address suits arising under other federal, state or tribal laws against private, federal or state employers of tribal members; nor does it discuss Indian preference laws. For a discussion of general rights of Indian employees, see Craig Becker & Darlene Thomas, *Labor Law and the Native American,* 8 INDIAN LAW SUPPORT CENTER REP. 1 (1985). The Supreme Court addressed Indian preference laws in Morton v. Mancari, 417 U.S. 535 (1974). *See also* Kevin N. Anderson, *Indian Employment Preference: Legal Foundations and Limitations,* 15 TULSA L.J. 733 (1980).

6. Santa Clara Pueblo v. Martinez, 436 U.S. 56, 70 (1978).

7. *Id.* at 65 ("[t]ribal forums are available to vindicate rights created by the ICRA"). *But see infra* text accompanying notes 171-194.

8. One commentator views this problem not only as a problem of inability to vindicate individual rights, but one of legitimacy of the tribal legal system itself:

tribes.[9] In addition, the failure of tribes to address ICRA issues generally has provoked repeated efforts by Congress to pass legislation granting control over tribal courts and review of tribal ICRA decisions by federal courts;[10] such federal oversight would further erode tribal sovereignty. An additional problem arises from the fact that aggrieved employees may be treated differently by courts analyzing their ICRA rights, depending on whether the employees are Indians or non-Indians.[11]

The focus of this Article is on Indian tribes' treatment of sovereign immunity, both in their own laws and under the ICRA, and on tribal court interpretations of these laws. Because employment suits alleging violations of the ICRA are increasingly appearing on tribal court dockets, the discussion will focus on employment claims.[12] After first

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> The legitimacy of the system is particularly enhanced if it provides for the protection of rights and the advancement of justice for individuals or groups who are unable to protect their basic rights and interests through majoritarian politics.
>
> This dilemma involving individual and group rights is particularly acute when considering the nature of the rights sought to be recognized within tribal systems. The controversy over the . . . ICRA . . . is particularly instructive. In that controversy, the notion of strong individual rights that could be enforced against the majority government was alien to the tradition and custom of many tribes where the group, not the individual, is primary.
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> [T]he United States Supreme Court . . . made it clear that tribal courts were the appropriate forums for adjudication of individual claims concerning such ICRA individual guarantees as due process and equal protection.
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> Many tribal courts have not yet arrived at an accommodation of these dictates and continue to . . . use the shield of sovereign immunity. This legal device prevents any resolution of claims involving individual rights on their merits and further inhibits the growth of legitimacy. The matter is not easily resolvable . . . .

Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 65 (1988).

9. One judge called it a "dinosaur of injustice." O'Brien v. Fort Mojave Tribal Ct., 11 Indian L. Rep. 6001, 6002 (Ft. Mojave Tribal Ct. 1983). *See infra* text accompanying notes 160, 202-11. At Sovereignty Symposium IV, sponsored by the Oklahoma Supreme Court, the Oklahoma Indian Affairs Commission and The Sovereignty Symposium, Inc. and held in Oklahoma City June 10-12, 1991, a session focused on "Indian Civil Rights in Tribal Courts." The Honorable Arvo Q. Mikkanen, a judge for the Court of Indian Appeals for the Anadarko Area Tribes and for the Sac & Fox Nation-Kickapoo Tribes, expressed dissatisfaction with tribes' assertion of the sovereign immunity defense in ICRA claims. Arvo Q. Mikkanen, *Civil Rights in Tribal Courts*, Sovereignty Symposium IV 599 (1991). Judge Mikkanen is the author of Executive Comm. of the Wichita Tribe v. Bell, 18 Indian L. Rep. 6041 (Ct. Ind. App., Wichita. 1990), which held the tribe to be immune from a suit alleging due process violations in a termination from employment. Ken Bellmard, a practitioner, stated in his written remarks that:

> The practical effect of the ICRA was to restrict tribal sovereignty just as did the seven major crimes act. It is inconceivable that the Congress which enacted the ICRA for the protection of individual liberties would allow the denial of access to tribal forums and remedies to individuals asserting ICRA protections. Although a tribal official may in his official capacity for example, fire a tribal employee for a discriminatory purpose and in violation of the ICRA, does such a firing by an official acting in an official capacity preclude the aggrieved former employee from bringing a suit under the ICRA because of the doctrine of tribal sovereign immunity? The answer to this query must be no!

Ken Bellmard, *The Doctrine of Tribal Immunity and Application of the Indian Civil Rights Act to Causes of Action in Tribal Courts: Tribal Sovereign Immunity, Sword or Shield?*, Sovereignty Symposium IV 605, 611 (1991).

10. *See infra* text accompanying notes 222-31.

11. *See infra* text accompanying notes 98-105.

12. However, issues raised here may be pertinent to other issues arising in tribal courts under the ICRA as well.

describing the growth of tribal employment, the Article will discuss generally how the concepts of tribal sovereignty and the ability to assert the sovereign immunity defense have been shaped by United States law. It will then describe how tribes have treated sovereign immunity in their own laws. Next, the Article will explain the applicability of the ICRA to tribal employment and focus on tribal courts' treatment of the sovereign immunity defense in employment claims brought under the ICRA. The Article will then discuss how the assertion of the sovereign immunity defense in ICRA claims may lead to further erosion of tribal sovereignty by the United States Congress.

To prevent such erosion of sovereignty through federal oversight, tribal governing bodies can address employment disputes in a way that would satisfy ICRA requirements and ensure equal treatment of all employees. Fairness in tribal employment actions, in turn, will actually reinforce sovereignty by strengthening tribal workforces and hence tribal economies. First, tribes should implement personnel policies containing grievance procedures that afford employees equal protection and due process under tribal law and custom. Economically stronger tribes can waive sovereign immunity in the limited context of employment, allowing tribal courts to hear employment claims arising under the ICRA. In order that these claims not prove too onerous, tribes can limit remedies in employment cases to "make-whole" relief such as injunctions, reinstatement and back pay. As part of the employment agreement, all employees can be required to agree to utilize tribal forums for the resolution of any employment disputes. Finally, less expensive means of dispute resolution can be explored.

II. TRIBES AS EMPLOYERS

While there are no statistics on the number of people employed in tribal government and businesses[13] nor on the number of tribally-owned businesses throughout the country, a number of sources indirectly indicate the extent of tribal employment. A 1985 directory lists approximately 5,186 Indian-owned businesses in all fifty states, the District of Columbia and Puerto Rico, many of which are identified as tribally or inter-tribally owned.[14] These businesses provide products and services in a sweeping range of industries: agriculture, forestry, fishing, mining, construction, manufacturing, transportation, public utilities, wholesale and retail trade, finance, insurance, real estate, lodging, recreation and amusement, personal and business services, entertainment, education, health, legal and social services and public administration.[15]

13. The Bureau of Indian Affairs publishes estimates of the Indian labor force residing on or near reservations; the latest report is dated January 1991 (although individual reports within the compilation are dated December 1991). U.S. Department of the Interior, Bureau of Indian Affairs, *Indian Service Population and Labor Force Estimates* (January 1991).

14. LACOURSE COMMUNICATIONS CORP., THE RED PAGES: BUSINESSES ACROSS INDIAN AMERICA (1985). This directory has not been updated.

15. *Id.* at 2-18.

Another source is a recent study of tribal economic development focusing on the business activities of four groups during the late 1980's.[16] This study describes various businesses developed and operated by the Passamaquoddies, the Mississippi Band of Choctaws, the Ak-Chin Indian Community and the Confederated Tribes of the Warm Springs Reservation. These relatively small tribes[17] generate a significant number of jobs. For example, in 1988, the Confederated Tribes of the Warm Springs Reservation, inhabited by 2,300 members of the Wasco, Warm Springs and Paiute tribes,[18] employed 1,200 people, with approximately half in tribal government.[19] The 5,000-member Mississippi Choctaw tribe also employed approximately 1,200 people in 1987,[20] making it the fifteenth largest employer in Mississippi.[21] The study also mentions the business activities of other tribes, including the Cherokee Nation of Oklahoma, sixty-percent of whose income is derived from tribal businesses;[22] the Eastern Band of Cherokees in North Carolina, which owns the world's largest mirror manufacturing facility;[23] and various other tribes that operate resort and tourist industries and joint venture agreements with United States manufacturers.[24]

A recent article on tribal economic development cites other examples "of Indian political power successfully evolving into economic power."[25] The Mescalaro Apache, the Conchiti Pueblo and White Mountain Apache "have dramatically wrested power over their land and resources from the federal bureaucracy and moved diligently to generate employment and tribal wealth from their resources."[26] The Quinault, Lummi, Swinomish and other tribes own and operate fish canneries in the Northwest and Alaska.[27] The Blackfeet are "a major player in the market for writing instruments."[28] The Oneidas, Gilas and other tribes own and operate office and industrial parks serving major metropolitan areas.[29] The Warm Springs Reservation "owns and operates a major sawmill and a large tourist resort."[30] Also, there are over 100 tribes "which operate bingo casinos with seating capacities often in the

16. ROBERT H. WHITE, TRIBAL ASSETS (1990). Another recent book, SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989), describes, to a lesser extent, governmental and economic activities of the Seneca Nation, the Muscogee (Creek) Nation of Oklahoma, the Cheyenne River Sioux, the Isleta Pueblo and the Yakimas.

17. WHITE, *supra* note 16, at 272. The tribes contain between 500 to 5,000 reservation inhabitants as compared to as many as 140,000 inhabitants of some tribes.

18. *Id.* at 189.

19. *Id.* at 211.

20. *Id.* at 75.

21. *Id.* at 57.

22. *Id.* at 271.

23. *Id.*

24. *Id.* at 271-72.

25. John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991).

26. *Id.*

27. *Id.* at 500.

28. *Id.*

29. *Id.*

30. *Id.*

thousands and jackpots approaching the millions."[31]

As tribal nations develop economically, they will continue to create more employment opportunities and thus more opportunities for employment disputes. But economic development is enhanced by a cohesive and loyal workforce. Employee loyalty is earned through use of personnel policies and practices that employees perceive as fair and necessary to the conduct of the business. Use of such policies will better enable tribes to diffuse and resolve disputes with their employees while maintaining good employee relations. Tribes with strong workforces and sound labor policies will be best equipped to exercise their sovereign powers to manage their government and business affairs.

III. TRIBES AS SOVEREIGN NATIONS

Despite the United States' fluctuating policies toward treatment of individual Indians and tribes,[32] it has continually recognized Indian tribes as politically distinct nations possessing inherent sovereign powers. Tribal sovereignty derives from tribes' status as self-governing nations whose existence predates that of the United States.[33] From the time of contact, first the European nations, then the colonies and then the United States government, recognized Indian tribes as nations and interacted with them through intergovernmental treaties.[34] The United States Constitution acknowledges the sovereignty of Indian tribes as well, and recognizes them on a par with foreign nations and the states as entities with which Congress may regulate commercial dealings.[35] Also, the Constitution excludes Indians from population counts for represen-

31. *Id.*

32. Since its inception, the United States government's policy toward individual Indians and tribal governments has shifted from government-to-government recognition, to antagonism and removal from tribal homelands, to self-determination, to assimilation into mainstream culture and termination of tribal-federal relations and back to self-determination. Throughout these shifts, tribal sovereignty has continually been eroded. This article does not discuss overall policies of the United States government toward Indian tribes, although these shifting policies influenced the development of the tribal sovereignty doctrine. For discussions of the sources of federal power over Indian tribes and various policies assumed in effecting this power, see Russel Lawrence Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty 31-134 (1980); Robert N. Clinton et al., American Indian Law 181-310 (1983); Felix S. Cohen, Handbook of Federal Indian Law 47-228 (1982); VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984); O'BRIEN, *supra* note 16, at 197-275.

Pending legislation "provid[ing] for the development, enhancement, and recognition of Indian tribal courts" declares that "[t]he Federal Government has a government-to-government relationship with each federally recognized tribal government." S. 1752, 102nd Cong., 1st Sess. (1991). *See infra* text accompanying notes 233-39.

33. "Before the coming of the Europeans, the tribes were self-governing sovereign political communities." United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

34. The United States government signed the first treaty with the Delaware tribe in 1778. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832). In 1871, Congress ended future treaty-making with Indian tribes. Act of Mar. 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1988)).

35. U.S. CONST. art I, § 8, cl. 3, provides: "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

tation and taxation purposes.[36]

However, Indian tribal nations are "strange sovereigns."[37] They are "unique in the world in that they represent the only aboriginal peoples still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands."[38] One commentator refers to the process by which tribes have become "sovereigns within a sovereign" as "involuntary annexation."[39] As a result of such "annexation," the extent of tribal nations' sovereignty has been limited by acts of the United States Congress and decisions of federal courts. Another commentator summarized the tribal nations' situation as follows:

> Unlike foreign countries, dealt with at arms length by the federal government, Indian tribes are subject to the ultimate sovereignty of the federal government: they govern within the territorial borders of the United States, and their members are United States citizens. Yet, Indian tribes are "domestic dependent nations," and not states of the Union able to claim rights against the central government through the traditions and constitutional structures supporting federalism.[40]

The United States Supreme Court, in three early cases known as the Marshall trilogy, established the legal framework for the United States government's recognition of Indian tribal sovereignty. In the first case, *Johnson v. M'Intosh*,[41] the Court relied on the "discovery doctrine" in refusing to recognize a tribe's ability to convey lands.[42] It reasoned that a tribe's "rights to complete sovereignty, as independent nations," were "necessarily diminished" through acquisition of their land by European nations through "discovery"[43] and those nations' subsequent land grants to the United States.[44] Therefore, the Court concluded, only the United States government could convey title to land occupied by Indian tribes.[45]

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36. U.S. CONST. art. I, § 2, cl. 3. The Fourteenth Amendment repeats the reference to Indians in its provision concerning apportionment. U.S. CONST. amend. XIV, § 2.

37. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

38. DELORIA & LYTLE, *supra* note 32, at 2.

39. "One of the legacies of the colonization process is the fact that Indian tribes, which began their interaction with the federal government as largely sovereign entities *outside* the republic, were increasingly absorbed into the republic, eventually becoming internal sovereigns of a *limited kind*." Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 417 (emphasis in original). Professor Pommersheim further argues that there is no basis in the United States Constitution for the notion of limited tribal sovereignty developed by the Supreme Court. On the latter point, see Newton, *supra* note 37, at 199 ("The mystique of plenary power has pervaded federal regulation of Indian affairs from the beginning.").

40. Newton, *supra* note 37, at 197.

41. 21 U.S. (8 Wheat.) 543 (1823).

42. *Id.* at 574.

43. *Id.* This is, as one commentator has pointed out, a polite way of describing acquisition by conquest, a word freely used in subsequent cases. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 692 (1989).

44. *M'Intosh*, 21 U.S. (8 Wheat.) at 584-87.

45. *Id.* at 586.

Subsequently, when the Cherokees sued for an injunction to prevent the state of Georgia from enforcing its laws within Cherokee territory, the Court held that Indian tribes were not foreign states entitled to sue in federal courts under Article III of the United States Constitution.[46] Rather, tribes were "domestic dependent nations . . . completely under the sovereignty and dominion of the United States."[47] Nevertheless, the Court recognized the Cherokee tribe as a "distinct political society, separated from others, capable of managing its own affairs and governing itself."[48]

One year later, in the concluding case of the Marshall trilogy, *Worcester v. Georgia*,[49] the Court established a limit on state power over tribal nations. The Court heard the petition of whites who had been prosecuted by the state of Georgia for violating those Georgia laws on Cherokee land.[50] In striking down statutes extending Georgia's powers into the Cherokee Nation, the Court stressed the independence of tribal governments from those of the states. It described Indian nations as "distinct, independent political communities,"[51] that had placed themselves "under the protection of one more powerful, without stripping [themselves] of the right of government, and ceasing to be a state."[52] The Court held that Georgia's laws interfered with the relationship between the federal government and the Cherokee Nation, "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[53] Thus, early on the United States Supreme Court recognized the status of Indian tribes as self-governing, sovereign nations subject only to limitations on their powers imposed by treaties or laws of the United States government.

The principles of tribal sovereignty enunciated in the Cherokee cases continue to govern Indian law today, despite subsequent federal limitations on the tribes' ability to govern themselves.[54] Federal diminution of tribal sovereignty has focused primarily on tribal authority

46. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
47. *Id.* at 17.
48. *Id.* at 16.
49. 31 U.S. (6 Pet.) 515 (1832).
50. *Id.* at 520.
51. *Id.* at 559.
52. *Id.* at 561.
53. *Id.*
54. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978).

> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

Id. at 323 (citations omitted). For a comprehensive discussion of the Cherokee cases and subsequent Supreme Court decisions involving tribal sovereignty and the relationship between tribes and the federal and state governments, see Robert G. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357 (1978). *See also* Resnick, *supra* note 43.

over nonmembers' activities in Indian country.[55] For example, Congress and the Supreme Court have diminished tribal sovereignty by imposing federal and state criminal laws within Indian country and granting federal or state jurisdiction over certain criminal acts committed there.[56] Jurisdiction over non-Indians' criminal activities in Indian country is thus vested exclusively in federal or state courts;[57] nevertheless, tribes have retained authority over criminal activities of Indians in Indian country.[58] Likewise, in the context of taxation, even though the Court has validated a state's ability to "reach into" Indian country to tax nonmembers, it recognizes tribal sovereign authority to tax activities and businesses in Indian country.[59]

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55. The term "Indian country" is defined as land " 'set apart for the use of Indians as such, under the superintendence of the Government.' " Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 111 S. Ct. 905, 910 (1991), (quoting United States v. John, 437 U.S. 634, 648-49 (1978)). "Indian country" is also defined at 18 U.S.C. § 1151 (1988) as follows:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. This definition, even though it appears in a federal criminal statute, has been applied generally to civil matters. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); *see also* Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 324-25 (1991).

56. In 1881, the Supreme Court cut back on *Worcester* when it held in United States v. McBratney, 104 U.S. 621 (1881), that the state could prosecute a non-Indian who murdered another non-Indian in Indian country. The General Crimes Act, 18 U.S.C. § 1152 (1988) and the Assimilative Crimes Act, 18 U.S.C. § 13 (1988) extend federal and state criminal laws into Indian country. In 1885, Congress passed the Major Crimes Act, 18 U.S.C. § 1153 (1988), giving federal courts jurisdiction over thirteen "major" crimes committed in Indian country, by Indians or non-Indians. The Supreme Court justified the Major Crimes Act in United States v. Kagama, 118 U.S. 375 (1886), on the basis of the "protectorate" relation between tribes and the federal government.

57. Again, relying on the protectorate doctrine, the Court eroded tribal criminal jurisdiction further in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), when it took away jurisdiction from tribes to prosecute non-Indians for commission of "non-major" crimes within a tribe's jurisdictional boundaries.

58. In Duro v. Reina, 495 U.S. 676 (1990), the Court held that tribes could not exercise criminal jurisdiction over Indians who were nonmembers of the tribe. *Duro* was subsequently nullified when Congress restored tribal jurisdiction over non-member Indians. Act of Oct. 28, 1991, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301 (1988 & Supp. II 1990)). For an account of Congressional correction of *Duro*, see Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992).

59. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), upheld tribal power to tax non-Indians doing business or performing services on Indian land; in each case, the Supreme Court held that such power derives solely from a tribe's sovereignty. The Court characterized the power to tax as "a necessary instrument of self-government and territorial management" that derives from its "general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137.

However, in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), and *Washington*, the Court held that states can require individual Indian sellers and tribes, respectively, to collect tax on sales of tobacco products to nonmembers. Most recently, in Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905, 909 (1991), the Court reached the same conclusion despite the

Although the Supreme Court has been somewhat more protective of tribal sovereignty in other kinds of civil cases,[60] the imposition of federal civil laws such as the ICRA on tribal activities has at the same time diminished tribal sovereignty.[61] The ICRA is generally referred to as the "Indian Bill of Rights," as it vests rights in individuals and concomitant obligations, or limitations, on the part of tribal governments similar to those enumerated in the Bill of Rights of the United States Constitution.[62] The mere imposition of the ICRA's limitations on tribes, essentially framed in terms developed in Anglo-American jurisprudence, conflicts with notions of tribal sovereign authority to fashion their own governing rules.[63]

The devastating effects of continued erosion of tribal sovereignty

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assertion that Oklahoma is not a Public Law 280 state as were those in *Moe* and *Washington*. In recognition of the principle that tribes possess "sovereign authority over their members and territories," *id.* at 910 (citing Cherokee v. Georgia, 5 Pet. 1 (1831)), the Court reasoned that the state's interest in collecting the tax justified the "minimal burden" on the tribe to collect it and did not interfere with tribal sovereignty. *Citizen Band Potawatomi*, 111 S. Ct. at 911.

60. Tribal courts generally retain civil jurisdiction over suits resulting from acts of nonmembers occurring within their jurisdictional boundaries. For example, in Williams v. Lee, 358 U.S. 217, 223 (1959), the Court held that an Arizona state court lacked jurisdiction over a collection action against Navajos by a non-Indian doing business on the Navajo reservation; rather, jurisdiction was proper only in a Navajo tribal court. The Court reasoned that allowing state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* Furthermore, in Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985), the Court held that whether jurisdiction exists in tribal courts must be determined first in the tribal courts, even though the question of tribal jurisdiction is a "federal question" under 28 U.S.C. § 1331. This determination is reviewable by the federal district courts. The Court differentiated between criminal cases, where Congress had expressly conferred jurisdiction on federal courts, and civil cases, where it had not. *Id.* at 854-55. Shortly afterward, the Court held in Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), that primary jurisdiction in tribal courts could not be defeated by alleging diversity jurisdiction. *Id.* at 19-20; *see also* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 329-32 (1989), for a thorough analysis of *National Farmers Union* and *Iowa Mutual*.

61. The Supreme Court acknowledged this fact in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the ICRA . . . represents an exercise of that authority." *Id.* at 56-57.

62. Because of tribes' sovereign status, the United States Constitution does not apply to them. Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (Fifth Amendment does not apply to actions of tribal governments); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). As the Court stated in *Santa Clara Pueblo*, rights accorded by the ICRA, however, are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57. The ICRA requires tribes to afford rights of free exercise of religion, speech, press, assembly, due process and equal protection; rights against unreasonable searches and seizures, double jeopardy and self-incrimination; rights against taking without just compensation; and in criminal cases, rights to a speedy trial, confrontation and securing of witnesses, and to counsel at defendant's expense and trial by a jury of six. The ICRA also prohibits excessive bail and fines, cruel and unusual punishment, imprisonment over one year per offense, fines in excess of $5,000, bills of attainder and ex post facto laws. 25 U.S.C. § 1302 (1992 Supp.) An account of the legislative history of the ICRA appears in DELORIA & LYTLE, *supra* note 32, at 200-14.

63. *See, e.g.*, Pommersheim, *supra* note 39, at 438 n.104 (citing Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49 (1971)). *See also* Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 314-15 (1991-92); Robert A. Wil-

under United States law is poignantly described by the Northern Plains Intertribal Court of Appeals in a recent employment case brought under the ICRA against the Sisseton-Wahpeton Sioux Tribe.[64] After recounting the history of treaty abrogation and the diminution of tribal sovereignty through federal legislation and court decisions, which the court described as "the worst-case scenarios in Indian law,"[65] it exhorted tribes and tribal courts to resist challenges to tribal sovereignty:

> Is then tribal sovereignty to be sacrificed on the alter of sacrificial word play—impliedly diminished by sue and be sued clauses predicated on doubtful intent, the result of boilerplate draftmen legalese? Should the courts foster the continuation of this process of sovereign erosion?
>
> Sovereignty refers to the inherent right and power to govern. It cannot be argued that a sovereign, using a political and economic definition can be a sovereign if it has anything less than total sovereignty. A political entity cannot exist if it has not the power to protect nor preserve its very existence. It appears then that much more than Wynde versus the college is at issue. The necessary political and economic viability of a tribe must retaliate against the subtle erosion of Native American institutions.
>
> Tribal sovereignty is the tribe. Its very existence as a political entity rests upon the foundation of sovereignty. No less certainly, than the Anglo system. . . .
>
> If this court is to preserve the tribe as a political, social, economic entity, a recognition of that corollary must begin with a careful studied analysis of the impact of the erosion of tribal sovereignty however minuscule. Erosion of tribal sovereignty by implication is no less than actual erosion of the tribe itself. What is the essence of a tribe? Tribal sovereignty![66]

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liams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276-78 (1989).

Professor Pommersheim discusses the need for American jurisprudence to recognize and accommodate differences in rules of culturally distinct sovereigns. He defines "sovereignty" as consisting of two components: "the recognition of a government's proper zones of authority free from intrusion by other sovereigns within the society, and the understanding that within these zones the sovereign may enact substantive rules that are potentially divergent or 'different' from that of other—even dominant—sovereigns within the system." Pommersheim, *supra* note 39, at 421. Pommersheim also discusses the potential for disrupting societies such as Indian tribes that may be held together by "family, community and cultur[al]" relationships as a result of members asserting their individual rights against the society. *Id.* at 438; *See also* Pommersheim, *supra* note 8, at 65.

See also THE INDIAN CIVIL RIGHTS ACT, U.S. COMM'N ON CIVIL RIGHTS REPORT 71 (1991):

> The Commission finds that in passing the Indian Civil Rights Act of 1968 the United States Congress did not fully take into account the practical application of many of the ICRA's provisions to a broad and diverse spectrum of tribal governments, and that it required these procedural protections of tribal governments without providing the means and resources for their implementation.

Id.

64. Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 INDIAN L. REP. 6033 (N. Plains Intertribal Ct. App. 1990).

65. *Id.* at 6034-35.

66. *Id.* at 6035.

Significantly, in *Santa Clara Pueblo v. Martinez*,[67] the Supreme Court checked the ICRA's potential erosive effect on tribal sovereignty by holding that the ICRA did not confer jurisdiction in federal courts except in *habeas corpus* actions.[68] In that case Ms. Martinez, a member of the Santa Clara Pueblo, and her daughter sued the Pueblo and its governor in federal court alleging a tribal ordinance violated their equal protection rights under the ICRA.[69] The ordinance extended membership in the Pueblo to children of male members who marry nonmembers but denied membership to children of female members who marry nonmembers; Ms. Martinez had married a Navajo.[70] First, the Court held that the Pueblo, but not its governor, was immune from suit under the ICRA.[71] It then held that the federal courts lacked subject matter jurisdiction over the Martinez' ICRA claim.[72] In so holding, the Court reiterated *Worcester*'s language that "Indian tribes 'are distinct, independent political communities, retaining their original natural rights' in matters of local self-government"[73] and reinforced the principle of sovereignty that allows tribes to retain legislative powers over their internal affairs and the necessary power to enforce those laws.[74] It cited the dual goals of the ICRA as "strengthening the position of individual tribal members vis-a-vis the tribe" and "the well-established federal 'policy of furthering Indian self-government.' "[75] In balancing those goals, the Court took into account the Act's silence with respect to jurisdiction for other than *habeas corpus* actions and concluded that "[c]reation of a federal cause of action for the enforcement of rights created in [the ICRA] . . . plainly would be at odds with the congressional goal of protecting tribal self-government."[76] Furthermore, the Court reasoned, the tribes themselves could be counted on to assure rights guaranteed by the ICRA: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies."[77]

Thus, while the United States created new rights for tribal members and imposed new obligations on the tribes, it left the enforcement of those rights and obligations to the tribes themselves. But despite *Santa Clara Pueblo*'s assurance that tribal forums would be available to vindi-

67. 436 U.S. 49 (1978). *Santa Clara Pueblo* is the only Supreme Court case interpreting the ICRA.

68. *Id.* at 59.

69. *Id.* at 51.

70. *Id.* at 52.

71. *Id.* at 59. *See infra* text accompanying notes 91-97.

72. *Santa Clara Pueblo*, 436 U.S. at 59.

73. *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

74. *Id.* at 55-56.

75. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

76. *Id.* at 64. *Santa Clara Pueblo* has been widely discussed as an example of the tension between societal values of two different governments; the debate over the validity of the decision is summarized in Laurence, *supra* note 63, at 305.

77. *Santa Clara Pueblo*, 436 U.S. at 65-66.

cate ICRA rights,[78] such suits actually have been foreclosed in many tribal forums under authority of that part of *Santa Clara Pueblo* upholding tribal sovereign immunity.

IV. TRIBAL SOVEREIGN IMMUNITY

One of the attributes of sovereignty is the sovereign's immunity from lawsuits for damages filed against it without its consent.[79] Unless the government has waived its immunity, it is absolutely immune from suit for its actions. However, officers and agents of the government enjoy limited immunity for actions taken within the scope of their authority or official duties; they are not immune from acts taken in their capacity as individuals or in their official capacity if such acts were outside the scope of their constitutional or statutory authority.[80]

Commentators cite the following rationales in support of the doctrine of sovereign immunity: there can be no legal right against the authority that establishes rights; the sovereign itself "can do no wrong;" allowing one branch of government to impose a judgment against another would violate separation of powers; lawsuits against a government would interfere with the government's ability to carry out its official duties and enforcement of judgments would cause economic losses that could impair or destroy government functions.[81] The applicability of the latter rationales to Indian tribes was articulated by a tribal court weighing the sovereign immunity question:

> [C]ritically important community interests are being protected by this immunity: Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the Sauk-Suiattle nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community. Secondly, any suit against the tribe forces the tribe to expend community monies in legal fees. The possible amounts that can be expended on this effort would be great if suits of this nature are not limited. Finally, the entire community stands to suffer irreparable harm if their leaders, foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices.[82]

The United States Supreme Court has long recognized and upheld tribal sovereign immunity from nonconsensual lawsuits in federal and

78. *Id.* at 65.

79. For a history of the development of the doctrine of sovereign immunity, see, for example, James Fleming, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 611-15 (1955). The Supreme Court's latest discussion of sovereign immunity appears in Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991), in which it held that states are immune from suit by Indian tribes.

80. *See, e.g.*, Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rep. 6085, 6091 (Ct. Ind. App., Ponca 1988); Miller v. Adams, 10 Indian L. Rep. 6034, 6036 (Intertribal Ct. App. 1982). This article focuses generally on immunity of tribes and tribal entities, not on immunity of tribal officials.

81. *See, e.g.*, Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 170-71 (1984).

82. Moses v. Joseph, 2 Tribal Ct. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980).

state courts.[83] Its first clear acknowledgement appeared in *United States v. United States Fidelity & Guar. Co.*,[84] where the Court dismissed a cross-claim against the United States, which had sued on behalf of the Choctaw and Chickasaw Nations, stating, "Indian Nations are exempt from suit without Congressional authorization," and that tribal immunity "passed to the United States for their benefit."[85] Subsequently, in *Puyallup Tribe, Inc. v. Dep't. of Game of Wash.*,[86] vacating the state court's judgment against the tribe, the Court deemed it "settled" that "[a]bsent an effective waiver or consent, . . . a state court may not exercise jurisdiction over a recognized Indian tribe."[87] The Court's most cited discussion of sovereign immunity, however, appears in its interpretation of the ICRA in *Santa Clara Pueblo v. Martinez*,[88] which, in addition to determining that there is no federal jurisdiction for a non-*habeas corpus* claim,[89] held tribes to be immune from federal suits arising under the ICRA.[90]

As stated previously, *Santa Clara Pueblo* involved a suit in federal court against the Pueblo tribe and its governor alleging that the Pueblo's membership ordinance violated equal protection rights guaranteed by the ICRA.[91] The Pueblo asserted its sovereign immunity in defense.[92] The Court first discussed its long-standing recognition that tribes, as sovereigns, are immune from suit unless Congress waived tribal immunity.[93] Any such waiver must be express and unequivocal.[94] It then found no explicit waiver in the text of ICRA.[95] Moreover, the Act's provision for federal *habeas corpus* relief could not be deemed a general waiver of tribal immunity because the respondent in a *habeas* suit would be an individual, not a tribe.[96] Therefore, the Court concluded, because the Act contained no explicit and unequivocal waiver of immunity, "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[97]

Although *Santa Clara Pueblo* should have foreclosed subsequent ICRA suits in federal and state courts, the Tenth Circuit denied a tribal defense of sovereign immunity and extended federal jurisdiction over an

83. A comprehensive catalog of federal and state court decisions recognizing tribal sovereign immunity appears in Justice Rice's concurring opinion in Sulcer v. Barrett, 17 Indian L. Rep. 6138, 6139-40 (Sup. Ct. Citizen Band Potawatomi 1990) (Rice, Chief J., concurring).

84. 309 U.S. 506 (1940). For discussions of the Supreme Court's development of the doctrine of tribal sovereign immunity, see Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982).

85. *U.S. Fidelity & Guar. Co.*, 309 U.S. at 512.

86. 433 U.S. 165 (1977).

87. *Id.* at 172.

88. 436 U.S. 49 (1978).

89. *See supra* text accompanying notes 67-77.

90. *Santa Clara Pueblo*, 436 U.S. at 72.

91. *See supra* text accompanying notes 67-77.

92. *Santa Clara Pueblo*, 436 U.S. at 53.

93. *Id.* at 55-59.

94. *Id.* at 58.

95. *Id.*

96. *Id.* at 68.

97. *Id.* at 59.

ICRA claim in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes.*[98] The claim, alleging deprivation of due process rights, was brought against the tribes by a non-Indian-owned corporation. The plaintiff corporation had built a lodge on land owned by non-Indians within the reservation, but the access road crossed an Indian allotment.[99] The tribes' Joint Business Council directed that the access road be closed.[100] The plaintiff filed suit in the tribal court, which declined jurisdiction because the council would not consent to the suit.[101] The suit ended up in federal court, where the district court held the tribes to be immune from suit under *Santa Clara Pueblo.*[102] The Tenth Circuit reversed, distinguishing *Santa Clara Pueblo* as "entirely an internal matter concerning tribal members . . . [who] had access to their own elected officials and their tribal machinery to settle the problem."[103] The court was concerned not only with the unavailability of any remedy for the plaintiffs, but with the fact that the plaintiffs seeking the remedy were not Indians.[104] Citing no authority, it held that *Santa Clara Pueblo's* rule that tribes were immune from suit in federal court under the ICRA did not apply "when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian."[105]

Dry Creek Lodge has been criticized by commentators[106] and other circuits have refused to follow it.[107] Nevertheless, in the context of employment, it looms as a potential source for access to federal courts for non-Indian tribal employees who sue tribal employers under the ICRA.

98. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).
99. *Id.* at 684.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 685.
104. *Id.*
105. *Id.*
106. *See, e.g.*, Pommersheim & Pechota, *supra*, note 84, at 566-67; Kevin Gover & Robert Laurence, *Avoiding* Santa Clara Pueblo v. Martinez*: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 499-503 (1985); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 265 (1987).
107. R. J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); ShortBull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982). The Tenth Circuit limited *Dry Creek Lodge* in Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1460 nn.4-5 (10th Cir. 1989) ("the *Dry Creek Lodge* exception is to be narrowly construed and thus must involve only egregious circumstances that do not involve internal tribal affairs and is applicable only where no tribal remedy is available"); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982). These cases (except *Nero*) and others are cited and discussed in Gover & Laurence, *supra* note 106, at 512-15.

In an employment case, the court for the Western District of Oklahoma, relying on *Santa Clara Pueblo*, held that it did not have jurisdiction over an ICRA claim for a non-Indian tribal employee because of tribal sovereign immunity. Sulcer v. Citizen Band Potawatomi Indian Tribe, 19 Indian L. Rep. 3071, 3071 (W.D. Okla. 1992). The court cited *Nero* and Williams v. Pyramid Lake Paiute Tribe, 625 F. Supp. 1457, 1458 (D. Nev. 1986) which stated, "*Dry Creek Lodge* is not the law of this circuit, nor is it the law of the United States." *Sulcer*, 19 Indian L. Rep. at 3071.

Some federal and state courts attempt to distinguish between tribes' "governmental" and "corporate" (or "proprietary") functions for the purpose of ascertaining immunity. Such distinction could conceivably open tribes to suits by tribal corporation employees. Most cases arose in the context of whether a tribal corporation chartered under § 17 of the 1934 Indian Reorganization Act[108] waived sovereign immunity by virtue of a standard "sue and be sued" clause. Although some courts held that such clauses waived sovereign immunity,[109] others concluded that immunity must be determined on a case-by-case basis.[110] Because § 17 corporations are usually administered by the tribal council or some other tribal governmental body, the primary inquiry regarding the extent of waiver under a "sue and be sued" clause must be whether the tribe acted through the corporation in its governmental or corporate capacity.[111] Other courts have looked merely to the fact that a tribe acted through a corporation and held that the tribe had waived immunity on that basis.[112] Absent any express waiver, whether a tribe is acting in a governmental or proprietary capacity should make no difference in determining its immunity.[113]

In 1991, the United States Supreme Court explicitly refused to abrogate the doctrine of tribal sovereign immunity or to distinguish between governmental and proprietary functions for the purpose of determining immunity. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*,[114] the State of Oklahoma urged the Court to "abandon entirely" tribal sovereign immunity.[115] Alternatively it argued that immunity should not attach to tribal businesses, but rather "should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal businesses from the authority of the States to administer their laws."[116] The Court responded that it would neither abandon the doctrine of tribal

108. 25 U.S.C. § 477 (1988). The Indian Reorganization Act sets up two mechanisms by which tribes could organize politically and economically. Section 16 allows tribes to adopt constitutions and by-laws, 25 U.S.C. § 476 (1988). Section 17 allows them to set up corporations, 25 U.S.C. § 477. All documents have to be approved by the Secretary of the Interior. 25 U.S.C. § 476. Section 17 charters are standardized and most contain "sue and be sued" clauses. Pommersheim & Pechota, *supra* note 84, at 556.

109. Pommersheim & Pechota, *supra* note 84, at 558.

110. *Id.*

111. *See id.* at 558-61 (discussing Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977)); Parker Drilling v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978). Section 17 corporate charters generally limit the extent of judgments against corporations to "income or chattels specifically pledged or assigned," and immunity has generally been waived only to that extent. Pommersheim & Pechota, *supra* note 84, at 560-61.

112. Dixon v. Picopa Constr. Co., 772 P.2d 1104 (Ariz. 1989); Steve E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 124-25 (1992). The Comment also discusses Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), which held the Pueblo amenable to suit for its off-reservation activity.

113. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006, 6008 (Ct. Ind. App. Pawnee 1991).

114. 111 S. Ct. 905 (1991).

115. *Id.* at 909.

116. *Id.* at 909-10. The state was attempting to force the tribe to assess and collect tax on sales of cigarettes at a tribally owned convenience store on trust land.

immunity nor limit it to apply only to governmental activity.[117] It justified this determination by observing that Congress had "consistently reiterated its approval of the immunity doctrine" developed in *Santa Clara Pueblo* and earlier cases[118] by passing acts such as the Indian Financing Act of 1974[119] and the Indian Self-Determination and Education Assistance Act,[120] which "reflect Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.' "[121] Wholesale elimination of the immunity defense for tribal businesses, the Court reasoned, would thwart these goals.

Sovereign tribes may waive immunity and thereby consent to a lawsuit. It has been debated whether a tribe may waive immunity without congressional approval.[122] Despite the Court's statement in *United States v. United States Fidelity & Guaranty Company*[123] that tribes are "exempt from suit without congressional authorization,"[124] courts and commentators conclude that tribes can waive sovereign immunity without congressional approval.[125] Language in *Citizen Band Potawatomi* buttresses this conclusion. Citing *Santa Clara Pueblo*, the Court stated, "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe *or* congressional abrogation."[126] *Santa Clara Pueblo* had not discussed whether a tribe could waive its immunity and made no general statements to that effect; it only looked to whether Congress had waived tribal immunity from suit in ICRA claims. Nevertheless, the insertion of an "or" in *Citizen Band Potawatomi*'s statement indicates the Court's recognition that, even though Congress can waive tribal immunity, Indian tribes, as sovereigns, possess the ability to waive their immunity from suit as they see fit.

V. TREATMENT OF SOVEREIGN IMMUNITY IN TRIBAL LAWS

Tribes have addressed their sovereign immunity in myriad ways.[127]

117. *Id.* at 910.
118. *Id.*
119. 25 U.S.C. §§ 1451-1543 (1988).
120. 25 U.S.C. §§ 450-450n (1988).
121. *Citizens Band Potawatomi*, 111 S. Ct. at 910 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).
122. *See* Pommersheim & Pechota, *supra* note 84, at 558-64.
123. 309 U.S. 506 (1940).
124. *Id.* at 512.
125. Sulcer v. Barrett, 17 Indian L. Rep. 6138, 6140 (Citizen Band Potawatomi Sup. Ct. 1990) (Rice, Chief J., concurring); Gonzales v. Allen, 17 Indian L. Rep. 6121, 6122 (Shoshone-Bannock Tr. Ct. 1990) (dictum); *see also*, Dietrich, *supra* note 112, at 122; Johnson & Madden, *supra* note 81, at 161; Alvin J. Ziontz, *After* Martinez: *Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 26 (1979). The exception to tribal ability to waive sovereign immunity is with respect to property held in trust by the federal government. *See* Hansen, *supra* note 55, at 328; Johnson & Madden, *supra* note 81, at 159.
126. *Citizens Band Potawatomi*, 111 S. Ct. at 909 (emphasis added).
127. Unless otherwise indicated, tribal constitutions and codes cited here were examined from INDIAN TRIBAL CODES (R. Johnson, ed. 1988) (microfiche collection) and the files of the National Indian Law Library (NILL) in Boulder, Colorado, during July 1992. All documents in INDIAN TRIBAL CODES (1988) were examined. At NILL, documents were selected from a computer search of the words "sovereign," "immunity" and "jurisdic-

Many state in their tribal codes that immunity is not waived except in accordance with federal or tribal law and when the waiver is made in specific language by a resolution of the tribal governing body.[128] Other tribes include language under a jurisdiction provision stating that tribal courts have no jurisdiction over suits against the tribe, its officers or employees unless the tribal governing body has consented.[129] The Spokane Tribe requires consent to waiver by both the tribe and the United States.[130] The Navajo Nation's Sovereign Immunity Act[131] codifies the principle of sovereign immunity and specifies the circumstances under which the Nation waives its immunity from suit.[132] Those circumstances include, *inter alia*, when suit is explicitly authorized by federal law or a

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tion," as the tables of contents of 143 constitutions and codes in its collection are "online." NILL is in the process of obtaining up-to-date versions from tribes across the country, but the librarians indicated that this has been difficult. Consequently, some of the codes and constitutions referred to here may not be current.

Additional citation will refer to the work of Johnson & Madden, *supra* note 81, at 161-63 n.35-40, who conducted a similar study of tribal treatment of sovereign immunity using forty tribal codes selected at random from INDIAN TRIBAL CODES (R. Johnson, ed. 1981) (microfiche collection). I reiterate their warning:

> Anyone involved in a sovereign immunity issue on a particular reservation would do well to make a careful study of the tribal code, constitution, tribal resolutions, regulations of different committees, corporate charter, corporate minutes, insurance contracts, and other sources . . . [and] should examine carefully the entire official copy . . . and all amendments.

Johnson & Madden, *supra* note 81, at 162 n.36.

128. *E.g.*, TRIBAL LAWS OF THE BURNS PAIUTE INDIAN RESERVATION ch. V(B) (1979); LAW AND ORDER CODE OF THE CHEYENNE RIVER SIOUX ch. VIII, § 1-8-4 (1978); LAW AND ORDER CODE OF THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION ch. 3, § 3.3 (1987); CHOCTAW TRIBAL CODE ch. 5, § 1-5-4 (1981); LAW AND ORDER CODE OF THE COEUR D'ALENE TRIBE OF INDIANS ch. 1, § 1-5.01 (1985); LAW AND ORDER CODE OF THE DELAWARE TRIBE OF BARTLESVILLE, § 1-1-2 (1984); NOOKSACK TRIB. CODE OF LAWS tit. 10, § 10.01.110 (1982); TRIB. CODE OF THE NORTHERN CHEYENNE RESERVATION ch. 3, § 1-3-2 (1987); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE ch. 2, § 4-2-1 (1985); LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UNITAH AND OURAY RESERVATION UTAH § 1-8-5 (no date); WARM SPRINGS TRIB. CODE 205.001ff (1988), *cited in* Gould v. Confederated Tribes of the Warm Springs Indians, 17 Indian L. Rep. 6052, 6053 (Warm Springs Tribal Ct. 1990).

129. *E.g.*, LAW AND ORDER CODE OF THE COLORADO RIVER INDIAN TRIBES ch. A, § 101 (no date); CROW LAW AND ORDER CODE ch. 1, § 1-160 (1977); FORT BELKNAP INDIAN LAW & ORDER § XII(12.2) (no date); SAULTE STE. MARIE TRIBE OF CHIPPEWA INDIANS LAW AND ORDER ch. 7, § 7.2 (1980); TRIB. CODE OF THE SISSETON-WAHPETON SIOUX TRIBE ch. 33, § 33-02-01 (no date), *cited in* Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6036 (N. Plains Intertribal Ct. 1990); STANDING ROCK SIOUX CODE OF JUSTICE § 1-108 (no date); ZUNI TRIB. CODE ch. 2, § 1-2-6(2); *see also* Johnson & Madden, *supra* note 81, at 162 n.36-38.

130. LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS-SPOKANE RESERVATION § 1-13 (1987).

131. The purpose statement reads as follows:

> The purpose and intent of the Navajo Sovereign Immunity Act is to balance the interests of individual parties in obtaining the benefits and just redress to which they are entitled, under the law and in accordance with the orderly processes of the Navajo nation government, while at the same time protecting the legitimate public interest in securing the purposes and benefits of their public funds and assets, and the ability of their government to function without due interference in furtherance of the general welfare and the greatest good of all the people.

NAVAJO TRIB. CODE tit. 1, §§ 351-55 (1988).

132. "The Sovereign Immunity Act is nothing more than a reinforcement of the common law immunity from suit of the Navajo Nation as an independent sovereign." MacDonald v. Navajo Nation, 18 Indian L. Rep. 6003, 6006 (Nav. Sup. Ct. 1990).

resolution of the Tribal Council, when the claim is expressly covered by liability insurance or when the claim arises under the Bill of Rights of the Navajo Nation.[133]

Some tribes include an immunity provision in specific ordinances or chapters. For example, the Muckleshoot Tribe includes a sovereign immunity provision in its zoning,[134] licensing and revenue,[135] gaming[136], housing,[137] traffic,[138] fireworks,[139] tobacco[140] and liquor[141] ordinances. The Chehalis juvenile ordinance contains an immunity statement.[142] Other tribal codes simply acknowledge tribal immunity in a general statement.[143]

Waivers may also be specific to tribal civil rights laws. The Colville Tribal Civil Rights Act[144] waives sovereign immunity of the Colville Tribes in tribal courts for suits alleging deprivation of rights enumerated in that Act;[145] those rights basically parallel the rights afforded by the ICRA.[146] The only remedies available are declaratory and injunctive,[147] unless the claim is covered by insurance, in which case damages may be awarded for the amount of coverage in accordance with the terms of the policy.[148] The Law and Order Code of the Fort McDermitt Paiute-Shoshone Tribe of Oregon and Nevada states that the Tribal Council may waive immunity in civil contempt proceedings in tribal courts to enforce equal protection and procedural due process rights.[149] The Navajo Sovereign Immunity Act waives immunity for lawsuits alleging violations of civil rights guaranteed by the Navajo Nation Bill of Rights.[150]

Tribes also address sovereign immunity in their constitutions. Some provide for waiver of immunity for actions arising under the tribal constitution and laws, as well as under the ICRA. For example, the Menominee constitution provides that the tribal legislature generally can-

133. NAVAJO TRIB. CODE tit. 1, § 354 (1988).
134. CONST. AND BYLAWS FOR THE MUCKLESHOOT INDIAN TRIBE tit. 7, § 7.01.100 (1977).
135. *Id.* tit. 8, § 8.09.040.
136. *Id.* tit. 11, § 11.13.02.
137. *Id.* tit. 13, § 13.13.030.
138. *Id.* tit. 15, § 15.09.010.
139. *Id.* tit. 16, § 16.01.130.
140. *Id.* tit. 17, § 17.01.070.
141. *Id.* tit. 18, § 18.01.080.
142. CONST. AND BYLAWS OF THE CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION tit. 12, § 12.10.010 (no date).
143. *E.g.*, GILA RIVER INDIAN COMMUNITY CODE tit. I, § 1.327 (no date); PORT GAMBLE KLALLAM LAW AND ORDER CODE, preamble (1984).
144. LAW AND ORDER CODE FOR THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION tit. 56, §§ 56.01-56.08 (1988).
145. *Id.* § 56.06.
146. *Id.* § 56.02.
147. *Id.*
148. *Id.* § 56.08.
149. LAW & ORDER CODE OF THE FORT MCDERMITT PAIUTE-SHOSHONE TRIBE OF OR. AND NEV. ch. 1, §§ 1, 3 (1988).
150. NAVAJO TRIBAL CODE tit. 1, § 354 (1988). The Navajo Nation Bill of Rights appears at NAVAJO TRIBAL CODE tit. 1, §§ 1-9 (1988).

not waive the tribe's immunity,[151] but it does allow suit against the tribe in tribal courts "for the purpose of enforcing rights and duties established by this Constitution and Bylaws, by the ordinances of the Tribe, and by the Indian Civil Rights Act . . . ."[152] The constitution of the Jamestown Klallam Tribe empowers the tribal courts "to review and overturn tribal legislation and executive actions for violations of this Constitution or of the [ICRA]."[153] Similar language in the Standing Rock Sioux tribal constitution extending the power of tribal courts "to all cases in law and equity arising under the constitution or laws of the tribe" was held to have waived the immunity of the tribal election commission in a suit protesting the commission's hearings on an election contest.[154]

Tribal agencies and corporations may be granted limited waivers of immunity by their respective tribes.[155] A Muckleshoot ordinance extends the immunity of the tribe to the Muckleshoot Tribal Enterprise, a governmental agency,[156] but the manager of the Tribal Enterprise, with the consent of the director of business development and the tribal council, can waive immunity in "contract, agreements, or leases . . . with regard to certain specific assets of any type or kind in courts with jurisdiction over such assets."[157] The Articles of Incorporation of the Cheyenne-Arapaho Tribal Development Corporation[158] provide that the corporation cannot waive or limit the tribal council or business committee's immunity, but it can consent to be sued in tribal courts by indicating the terms and conditions of the consent in an agreement, contract or other instrument.[159] Recovery is limited to the amount of the assets

151. CONST. AND BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. art. XVIII, § 1 (1977).

152. *Id.* art. XVIII, § 2. *See* Johnson & Madden, *supra* note 78, at 163.

153. CONST. OF THE JAMESTOWN KLALLAM TRIBE OF INDIANS art. VIII (1983).

154. Murphy v. Standing Rock Sioux Election Comm'n, 17 Indian L. Rep. 6069, 6070 (Standing Rock Sioux Tribal Ct. 1990).

155. Tribal corporate charters may be of two types. First, those adopted under § 17, 1934 Indian Reorganization Act, 25 U.S.C. § 477 (1988); (*see supra* notes 108 & 111). Second, those adopted under a tribes' own authority. *See, e.g.*, Bd. Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6037 (N. Plains Intertribal Ct. App. 1990) (Gillette, J., concurring) ("a tribe can charter an entity upon such terms as the tribe sees fit"). As indicated in the text, most corporate charters drafted by the tribes themselves carefully designate the extent of waiver.

156. CONST. AND BYLAWS FOR THE MUCKLESHOOT INDIAN TRIBE tit. 19, § 19.01.010 (1977):

> Muckleshoot Tribal Enterprises evolved as a branch of the tribal government serving as a mechanism for the tribal government to increase opportunities for members to obtain business training, experience, and employment on the Reservation and on off-Reservation tribal lands, to encourage the continued production of Muckleshoot and other Native American crafts, and to establish on-going, revenue sources which would provide funds for basic tribal government services and improve the economic, social, educational, health and overall living conditions of Muckleshoot people.

Id.

157. *Id.* § 19.01.100.

158. ART. OF INCORPORATION OF THE CHEYENNE-ARAPAHO TRIB. DEV. CORP. art. XIII (1988).

159. *Id.* art. XIII(D).

described in the instrument.[160] The Charter of the Chehalis Indian Tribal Enterprises Construction Company waives the immunity of the company and its assets but not of the tribe and its assets.[161]

When no constitutional or code provision exists, tribal courts have looked to other tribal documents to determine the extent of tribal immunity. For instance, one tribal court found a waiver of immunity in an insurance policy.[162] In employment cases, courts have examined personnel manuals.[163] The Turtle Mountain Court of Appeals found that the tribe's personnel policies, by requiring due process in termination proceedings, waived the immunity of the tribe in a lawsuit alleging violation of the manual's termination procedures.[164] On the other hand, the Sauk-Suiattle Tribal Court held, in the absence of any other statement in the tribe's law concerning sovereign immunity, that termination provisions of the tribal personnel manual did not waive sovereign immunity based on the fact that the manual stated that it "shall not, in any way, waive the sovereign immunity of the . . . Tribe."[165] The court reached this conclusion despite a provision in the tribal constitution ensuring civil rights to tribal members.[166] Similarly, the Grand Ronde Tribal Court held that the provisions of a personnel manual permitting an employee to appeal his termination of employment to the tribal court did not waive the tribe's sovereign immunity from a claim for back wages even though the employee had been found to have been wrongfully terminated and had been reinstated.[167]

If no constitutional or code provision or other document speaks to sovereign immunity, a tribal court may look to its tribe's common law to determine the existence or extent of immunity. For example, in an employment termination case, the Fort Mojave Tribal Court rejected the tribe's defense of sovereign immunity under tribal common law.[168] After noting that it was "unaware of any provisions in the Mojave tribal custom and tradition which would approximate sovereign immunity" and recounting the history of the defense and the exceptions that had arisen to it in Anglo-American law, the court termed the defense "a dinosaur of injustice" and declined to adopt it into tribal law.[169] However, other tribal courts have held that sovereign immunity exists as part

160. *Id.*

161. CHARTER OF THE CHEHALIS INDIAN TRIBE ENTERS. CONSTR. CO. ORDINANCE NO. 1980-1 art. I, § 1.05.

162. Johnson & Madden, *supra* note 81, at 167 (citing Mitchell v. Confederated Salish & Kootenai Tribes (Flathead Tribal Ct. 1982)).

163. That statements in personnel manuals may bind a tribe has analogues in federal and state law, under which personnel manuals may create due process and contract rights in employment. *See, e.g.*, Vinyard v. King, 728 F.2d 428 (10th Cir. 1984).

164. Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979).

165. Moses v. Joseph, 2 Tribal Ct. Rep. A-51, A-53 (Sauk-Suittle Tribal Ct. 1980).

166. *Id.* at A-54.

167. Guardipee v. Confederated Tribes of the Grand Ronde Comm'n of Ore., 19 Indian L. Rep. 6111 (Grand Ronde Tribal Ct. 1992).

168. *Id.* at 6002.

169. O'Brien v. Fort Mojave Tribal Ct., 11 Indian L. Rep. 6001, 6002 (Ft. Mojave Tribal Ct. 1983).

of tribal law solely by virtue of their tribes' sovereign status.[170]

Tribal courts disagree on whether the ICRA itself waives sovereign immunity of tribes in tribal courts for actions alleging violations of that Act.[171] The arguments on both sides rest on the seemingly inconsistent language supporting the two holdings of *Santa Clara Pueblo v. Martinez*.[172] Those courts holding that the ICRA waives immunity of tribes in tribal courts focus on *Santa Clara Pueblo's dicta* that the ICRA is an exercise of Congressional "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"[173] and that "[t]ribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."[174] The Cheyenne River Sioux Court of Appeals reasoned that "[i]t is hard to conceive that this language means anything else but that tribal courts must entertain causes of action based on the ICRA"[175] and denied the tribe's immunity defense. Similarly, the Turtle Mountain Tribal Court found this language an "express, unequivocal expression of congressional intent to provide jurisdiction to the tribal court based upon alleged violations of an individual's civil rights protected by the ICRA."[176]

However, courts holding that the ICRA does not waive tribal immunity in tribal courts rely on *Santa Clara Pueblo*'s unequivocal holding that the ICRA contains no express or implied waiver of immunity whatsoever; if the ICRA does not waive a tribes' immunity, the courts reason, a suit cannot be brought against the tribe under the ICRA in any court unless Congress or the tribe itself has expressly waived immunity.[177]

170. *See, e.g.*, Satiacum v. Sterud, 10 Indian L. Rep. 6013, 6015 (Puyallup Tribal Ct. 1982); Grant v. Grievance Comm. of the Sac and Fox Tribe of Indians of Okla., 2 Tribal Ct. Rep. A-39, A-41 (Ct. Indian Offenses for the Sac and Fox Tribe 1981); *Cf.* MacDonald v. Navajo Nation, 18 Indian L. Rep. 6003, 6006 (1990) ("The Sovereign Immunity Act is nothing more than a reinforcement of the common law immunity from suit of the Navajo Nation as an independent sovereign.").

171. *Compare* Gonzales v. Allen, 17 Indian L. Rep. 6121, 6122 (Shoshone-Bannock Tribal Ct. 1990) ("[t]he vast majority of both federal and tribal court cases have held that the Indian Civil Rights Act is not a waiver of tribal sovereign immunity"); *with* Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991) ("the majority of tribal courts have held that they have jurisdiction to enforce provision of tribal constitutions and the Indian Civil Rights Act").

172. *See supra* text accompanying notes 67-77 & 91-97.

173. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

174. *Id.* at 65.

175. DuPree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6108 (Cheyenne River Sioux Tribal Ct. App. 1988).

176. Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991).

177. The reluctance of tribal governments to waive sovereign immunity was acknowledged by the United States Civil Rights Commission's findings in its report on the Indian Civil Rights Act:

> The vindication of rights guaranteed by the Indian Civil Rights Act within tribal forums is contingent upon the extent to which the tribal government has waived its immunity from suit; concern about the potential effects of law suits, even for declaratory or injunctive relief, on the viability of tribal government has made some tribes reluctant to waive sovereign immunity to any extent, with the result that plaintiffs' efforts to adjudicate ICRA claims are frustrated.

THE INDIAN CIVIL RIGHTS ACT, U.S. CIVIL RIGHTS COMM'N, *supra* note 63, at 72.

For example, in a contract action against the tribe, the Court of Indian Appeals for the Pawnee Tribe responded to the plaintiff's argument that the ICRA impliedly waived the tribes' immunity:

> As the U.S. Supreme Court held in *Santa Clara Pueblo v. Martinez*, the Indian Civil Rights Act did not constitute a general waiver of a tribe's sovereign immunity. Rather, it permitted only habeas corpus relief in federal court for certain actions taken by a tribal government. It did not explicitly waive a tribe's immunity *in tribal court actions*. Furthermore, we will not imply such a waiver where none is specifically made in the federal statutes.[178]

As commentators have pointed out, *Santa Clara Pueblo*'s holding that the ICRA does not waive tribal immunity was reached "independently of, and prior to" its statement that tribal courts are available to hear ICRA claims.[179] Although the Court's statements about tribal courts appear inconsistent with its holding that the ICRA does not waive immunity, the statements did not seem to factor into the court's reasoning in reaching that holding.

Examination of reported tribal court cases indicates that most courts have held, in the absence of specific tribal laws addressing the question, that the ICRA does not waive their tribal immunity.[180] Some tribes' courts have overruled the sovereign immunity defense and assumed jurisdiction over ICRA actions: Cheyenne River Sioux,[181] Oglala Sioux,[182] and the Turtle Mountain Band of Chippewas.[183] However, the following tribal courts have held (or indicated in *dictum*) that the ICRA does not waive sovereign immunity: Colville Confederated Tribes,[184] Confederated Tribes of the Warm Springs Reservation,[185]

178. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006, 6008 (Ct. Ind. App.-Pawnee 1991) (emphasis added); *see also* Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6036 (N. Plains Intertribal Ct. App. 1990) (Gillette, J., concurring); Garman v. Fort Belknap Community Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984) ("tribal self-government must surely embody the concept that Indian tribes decide for themselves how to implement laws forced upon them by Congress"); Satiacum v. Sterud, 10 Indian L. Rep. 6014, 6015 ("plaintiff argues that the *Martinez* decision represents an explicit waiver of the tribe's immunity where a violation is alleged under the [ICRA]. This court rejects that argument and holds that a waiver of the tribe's immunity must be unequivocally expressed.")

179. Gover & Laurence, *supra* note 106, at 504. *See also* Pommersheim & Pechota, *supra* note 84, at 565 (Supreme Court's statement regarding tribal forums "pushes the camel through the eye of the needle . . . . The Court does not say and it seems clear that it did not consider the implications of what it was saying.").

180. *Contra* Hansen, *supra* note 55, at 329; Taylor, *supra* note 106, at 254-55.

181. Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6106 (Cheyenne River Sioux Ct. App. 1988) (employment).

182. Oglala Sioux Tribal Personnel Bd. v. Red Shirt, 16 Indian L. Rep. 6052 (Oglala Sioux Tribal Ct. App. 1983) (employment).

183. Davis v. Keplin, 18 Indian L. Rep. 6148 (Turtle Mountain Tribal Ct. 1991); Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979) (employment).

184. Stone v. Somday, 10 Indian L. Rep. 6039 (Colville Tribal Ct. 1983). In this employment suit against a tribal official, the court held that the ICRA, as interpreted by *Santa Clara Pueblo*, "does not affect the plain language of the tribe's sovereign immunity as a matter of tribal law." *Id.* at 6041.

Fort Belknap Community,[186] Navajo,[187] Southern Ute Tribe,[188] Shoshone-Bannock Tribes,[189] Pawnee,[190] Puyallup,[191] Sac and Fox,[192] Sisseton-Wahpeton Sioux,[193] and Standing Rock Sioux.[194]

VI. ICRA RIGHTS OF DUE PROCESS AND EQUAL PROTECTION IN TRIBAL EMPLOYMENT

Pertinent to tribal employment issues is the ICRA's requirement that an Indian tribe, "in exercising powers of self-government" accord due process and equal protection rights to "any person within its jurisdiction."[195] It should be noted, however, that the ICRA is not the exclusive source of such rights and obligations. Many tribal constitutions[196] contain bills of rights[197] and, as indicated in the preced-

185. Smith v. Confederated Tribes of the Warm Springs Reservation, 17 Indian L. Rep. 6055 (Warm Springs Tribal Ct. 1990) (employment).

186. Garman v. Fort Belknap Community Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984).

187. TBI Contractors, Inc. v. Navajo Tribe, 16 Indian L. Rep. 6017, 6018 (Navaho Sup. Ct. 1988) (breach of contract) (ICRA does not waive sovereign immunity under the "federal laws or regulations exception" to the Navajo Sovereign Immunity Act); Nez v. Bradley, 3 Navajo Reptr. 126 (Ct. App. 1982) (employment).

188. Pinnecoose v. Bd. Comm'rs of the S. Ute Pub. Hous. Auth., 19 Indian L. Rep. 6072 (S.W. Intertribal Ct. App. 1992) (employment).

189. Gonzales v. Allen, 17 Indian L. Rep. 6121 (Shoshone-Bannock Tribal Ct. 1990). In rejecting plaintiff's wrongful termination claim for back pay, the court reasoned that:

> [t]he vast majority of both federal and tribal court cases have held that . . . tribes *may* waive sovereign immunity in tribal courts without congressional approval, but have not held that Congress waived the immunity on behalf of the tribes [in the ICRA]. . . . Clearly the tribal council could waive sovereign immunity in this case, but they haven't.

Id. at 6122 (emphasis in original).

190. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006 (Ct. Indian App. Pawnee 1991) (breach of contract).

191. Satiacum v. Sterud, 10 Indian L. Rep. 6013, 6015 (Puyallup Tribal Ct. 1982) (election).

192. Grant v. Grievance Comm. of the Sac and Fox Tribe of Indians of Okla., 2 Tribal Ct. Rep. A-39 (1981) (employment).

193. Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033 (employment) (distinguishing Miller v. Adams, 10 Indian L. Rep. 6034 (Intertribal Ct. App. 1982)).

194. Defender v. Bear King, 17 Indian L. Rep. 6078, 6079 (Standing Rock Sioux Tribal Ct. 1989) (dictum) (employment).

195. 25 U.S.C. § 1302(8) (1992 Supp.).

196. The origins of tribal constitutions are discussed in Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393 (1991-92). Many tribal constitutions originated under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1988), which provided that a tribe could "organize for its common welfare, and may adopt an appropriate constitution and bylaws," to be ratified by tribal election and approved by the Secretary of the Interior. Tribes adopting § 16 constitutions merely accepted the boilerplate language of the Secretary's model. Pommersheim, *supra*, at 395. The model did not contain bills of rights or separation of powers provisions (including provisions for an independent judiciary), however. Nevertheless, a number of tribes did amend their constitutions to add bills of rights prior to the enactment of the ICRA. *Id.* at 397. For examples of modern tribal constitution-making, see CLINTON ET AL., *supra* note 32, at 378-79.

In Thorstenson v. Cudmore, 18 Indian L. Rep. 6051 (Cheyenne River Sioux Ct. App. 1991), a breach of contract and fraud suit against a tribal member by non-Indians, the Cheyenne River Sioux Court of Appeals discussed the inconsistency between the jurisdiction provision of the tribe's § 16 constitution and the tribe's traditional notions of due

ing section, a number of tribes have codified civil rights laws that grant tribal members due process and equal protection rights.[198]

"Due process" and "equal protection" are not foreign to Indian tribes as these concepts preexisted exposure to Anglo-American law. The Ponca Court of Indian Appeals explained that notions of due process, in the context of tribal law, necessarily arise from traditions, customs and development of law within the tribe itself:

> When analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law countries, upon which the United States' notions of due process are founded . . . . When entering the arena of due process in the context of an Indian tribe, courts should not simply rely upon ideas of due

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process. The constitution extended jurisdiction in tribal courts over disputes between Indians and non-Indians only upon stipulation by both parties. *Id.* at 6052. The court first considered the historical context of § 16 constitutions, observing:

> The conventional wisdom about constitutions, at least in the American context, is that they reflect the will of the people and that they were adopted by the democratic choice of the people or their elected representatives pursuant to wide-ranging public discussion. Whatever the general truth of this proposition in national and state history, it has little historical validity in the American Indian tribal context, particularly for those tribes who adopted constitutions and bylaws pursuant to the authorization set forth in the Indian Reorganization Act. . . . It is well established that these IRA constitutions were prepared in advance by the Bureau of Indian Affairs—almost in boilerplate fashion without any meaningful input or discussion at the local tribal level. Therefore it is clear that this "oddity" in Cheyenne River Sioux Tribal law—which has no comparable analogue in the United States or any state constitution—does *not* have its roots in any considered decision of the Cheyenne River Sioux people, but rather in some gross BIA oversight or self-imposed (legal) concern to tread cautiously when potential non-Indian interests were involved. Neither of these concerns were authorized by federal statute and ought *not* be given the force or respect of law.

Id. at 6053 (emphasis in original). The court then discussed public policy and legal concerns with jurisdiction by stipulation and concluded that the constitutional provision was not only "extremely hazardous to the jurisdictional health and integrity of the Cheyenne River Sioux Tribe," but "contravenes fundamental Lakota cultural notions of fair play that allow people the opportunity to be heard, which includes the right to have 'their day in court'." *Id.* at 6054.

197. Tribal constitutions containing bills of rights that include due process and equal protection provisions include: CONST. AND BY-LAWS OF THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY RESERVATION art. XI; CONST. AND BY-LAWS OF THE COLO. INDIAN RIVER TRIBES OF THE COLO. INDIAN RESERVATION OF ARIZ. AND CAL. art. III, § 3; DEL. CONST. art. III; CONST. OF THE HOH TRIBE art. IX; REVISED CONST. OF THE JICARILLA APACHE TRIBE art. IV; THE KIOWA INDIAN TRIBE OF OKLA. CONST. AND BY-LAWS art. VIII; CONST. FOR THE PUEBLO OF ISLETA, N.M. art. III; CONST. OF THE STANDING ROCK SIOUX TRIBE art. XI. Some tribes' constitutions incorporate ICRA rights by reference. *E.g.*, CONST. AND BY-LAWS OF THE FORT MOJAVE INDIAN TRIBE art. V; LUMMI CODE OF LAWS art. VIII.

198. *See supra* text accompanying notes 144-50. For example, the Navajo Nation Bill of Rights provides as follows:

> Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law.

Navajo Tribal Code tit. 1, Sec. 3 (1988).

> process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government . . . . One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition that might be entirely foreign to an Indian nation.[199]

Indeed, United States courts recognize that it is inappropriate to ascribe the same meaning to "due process" and "equal protection" as applied to actions of Indian tribes as when applied to actions of entities covered by the federal or state constitutions.[200]

Tribal courts have articulated the meaning of due process in their traditional laws. For example, the Supreme Court of the Oglala Sioux Tribe, in holding that persons are entitled to a hearing before being removed from the Pine Ridge reservation, pointed out that the tribe need not be told by the United States "when to give due process":

> Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree . . . . What must be remembered is that we must allow the other side the opportunity to be heard.[201]

The Citizen Band Potawatomi Supreme Court articulated a similar definition of due process under its tribal law in a case involving removal of an elected official from office: "The concept of due process entails fair treatment under the law, a right to notice and some opportunity to be heard."[202]

While there is no absolute "right" to tribal employment, tribes create rights to employment by implementing procedures governing terms of employment, including procedures for promotions or dismissals. Such procedures create "property" interests subject to due process.[203] For example, the Cherokee Nation of Oklahoma grants such property rights in employment in its constitution, which provides that anyone employed by the Nation for one year or more may not be removed from employment "except for cause" and is entitled to a hearing on such removal.[204] Other tribes have instituted personnel policies and proce-

199. Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rep. 6085, 6088 (Ct. Indian App., Ponca 1988).

200. *See, e.g.*, Smith v. Confederated Tribes of the Warm Springs Reservation of Or., 783 F.2d 1409 (9th Cir.), *cert. denied*, 479 U.S. 964 (1986); Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); *see also* Taylor, *supra* note 106, at 256 and cases cited therein.

201. Thorstenson v. Cudmore, 18 Indian L. Rep. 6051, 6054 (Cheyenne River Sioux Ct. App. 1991), *discussed in* Pommersheim, *supra* note 39, at 456.

202. Kinslow v. Business Comm. of the Citizen Band Potawatomi Indian Tribe of Okla., 15 Indian L. Rep. 6007, 6009 (Citizen Band Potawatomi Sup. Ct. 1988).

203. *See, e.g.*, Davis v. Keplin, 18 Indian L. Rep. 6148, 6151 (Turtle Mountain Tribal Ct. 1991); Executive Comm. of the Wichita Tribe v. Bell, 18 Indian L. Rep. 6041, 6042 (Ct. Indian App., Wichita 1990). These interpretations of due process under tribal law are consistent with the United States Supreme Court's interpretation of due process under the United States Constitution in Bd. of Regents v. Roth, 408 U.S. 564 (1972) and subsequent cases.

204. CONST. OF THE CHEROKEE NATION OF OKLA. art. XII (1986).

dures in tribal codes or personnel manuals that state appropriate standards to which employees will be held, define behavior that will warrant discipline and set out a procedure under which employees can grieve adverse decisions.[205]

No tribal court cases have dealt directly with equal protection issues in employment cases. Indian tribes may grant preferences in employment to tribal members,[206] and many have enacted tribal employment rights ordinances asserting the right to prefer tribal members in tribal employment.[207] But as to employment of tribal members, many tribes have incorporated equal protection into their constitutions and tribal codes.[208] One tribe has characterized its equal protection obligation to its members as follows:

> The Oglala Sioux Tribe is not bound by the Civil Rights Act of 1964, but is bound by the Indian Civil Rights Act of 1968. We exclude non-members of the Tribe, but we cannot discriminate among or between our Tribal members. No person in the service of the Oglala Sioux Tribe or person seeking admission into the service shall be appointed, promoted, demoted, removed, or in any way discriminated against because of his race, creed, color, sex or because of his political or religious opinions or affiliations.[209]

However, ICRA due process and equal protection rights in employment may not be enforceable against a tribe that raises the sovereign immunity defense to the ICRA claim.

VII. TREATMENT OF THE SOVEREIGN IMMUNITY DEFENSE IN TRIBAL EMPLOYMENT CASES

As discussed earlier, in most of the employment suits brought against tribes under the ICRA, tribal courts sustained the tribes' immunity defense.[210] Recent tribal court cases illustrate the dilemma faced by tribal employees who allege violations of employment policies by the tribe or its agencies and are confronted by the defense of sovereign immunity. In *Executive Comm. of the Wichita Tribe v. Bell*,[211] the plaintiff sued

205. *See, e.g.*, JICARILLA APACHE TRIB. CODE tit. 19, §§ 5-6 (1987); NAVAJO TRIB. CODE tit. 2, app. (1977); CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA art. XIV-XVI (no date).

206. *See generally* Anderson, *supra* note 5, at 742-52. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the extension of hiring preferences to Indians in the Bureau of Indian Affairs under Title VII and the Fifth Amendment Equal Protection Clause. The Court held that Indian preferences did not constitute racial discrimination; rather, such preferences were based on political affiliation. It cited the goals of the preferences to include "giv[ing] Indians a greater participation in their own self-government" and "reduc[ing] the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42.

207. *See, e.g.*, Res. No. 86-21 of the Lummi Indian Business Council (Feb. 4, 1986); NAVAJO TRIB. CODE tit. 15, ch. 7 (1984-85).

208. *See supra* text accompanying notes 197-98.

209. CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA art. XVII, § 81.

210. *See supra* text accompanying notes 180-94.

211. 18 Indian L. Rep. 6041 (Ct. Ind. App., Wichita 1990).

the tribal executive committee for terminating her employment in violation of the tribe's personnel policy. Although the reported decision does not mention the ICRA, the court found that the personnel policy granted "substantive rights" to the plaintiff.[212] Nevertheless, because the policy contained no explicit waiver of immunity, the court dismissed the suit, stating that without such a waiver "remedies may be unavailable for violations which are properly proven and shown."[213]

The existence of an incomplete remedy for a due process violation was similarly found in *Guardipee v. Confederated Tribes of the Grand Ronde Community of Oregon*.[214] There, a personnel policy that granted employees the right to appeal their discharges to the tribal court was held not to have waived the tribe's immunity from suit for back wages even when the employee was found to have been denied due process and had been reinstated.[215] The court stated that, even though "[a]ppellant will undoubtedly assert that the effect of this decision is to deprive him of an effective remedy to address his improper discharge," it was "not persuaded that the lack of certain enforcement remedies against the tribe, such as an award of money damages, can override the tribe's sovereign immunity from suit."[216]

The plaintiff in a wrongful termination suit under the ICRA was likewise denied a remedy in *Pinnecoose v. Board of Commissioners of the Southern Ute Public Housing Authority.*,[217] in which a tribal housing authority was held to be immune from a wrongful termination suit. The plaintiff alleged violation of due process and equal protection rights in the agency's failure to follow its written grievance procedure when terminating her employment.[218] Even though the tribal ordinance establishing the agency contained a "sue and be sued clause," the court held that the grievance procedure did not constitute a contract between the plaintiff and the agency that waived the agency's immunity from suit.[219] The court concluded its opinion with the following observation:

> It is totally unfortunate that litigants such as the appellant are met with what seems to be an insurmountable obstacle as that of 'tribal sovereign immunity.' However, the doctrine of tribal sovereign immunity has long been recognized and upheld by tribal, state and the federal court systems. If, however, there is a feeling by any party involved that any inequities exist as a result of this ruling, then the best place to resolve the issue is with the legislative body of the tribe.[220]

Indeed, tribal members can take up the issue of tribal immunity

212. *Id.* at 6042. The case does not quote the language of the personnel policy on which plaintiff relied.
213. *Id.*
214. 19 Indian L. Rep. 6111 (Grand Ronde Tribal Ct. 1992).
215. *Id.*
216. *Id.* at 6112.
217. 19 Indian L. Rep. 6072 (S.W. Intertribal Ct. App. 1992).
218. *Id.*
219. *Id.*
220. *Id.*

from ICRA actions through the tribal legislative process. This would avoid the risk, as some have predicted, that it will be taken up for them by the United States Congress, which continually threatens to further diminish tribal powers by eliminating the sovereign immunity defense and providing federal review of tribal court decisions.[221]

VIII. CONGRESSIONAL ATTEMPTS TO ENSURE ICRA ENFORCEMENT

In 1988 and 1989, Senator Orrin Hatch introduced bills to amend the ICRA to provide for review of tribal court decisions in federal courts.[222] The 1989 version would have reversed *Santa Clara Pueblo* by granting jurisdiction to federal district courts over ICRA claims for declaratory and equitable relief once the claimant[223] has exhausted "timely and reasonable" tribal court remedies.[224] The bill would have expressly waived tribal sovereign immunity for such claims.[225] It further would have directed the federal court to adopt the tribal court's findings, if made, unless the federal court determined that the tribal court: 1) was not "fully independent" from the tribal legislative or executive body; 2) acted without authorization; 3) allowed the tribe or its official to assert the sovereign immunity defense on claims for equitable relief; 4) did not resolve the factual dispute, or "adequately develop material facts"; 5) made findings not "fairly supported by the record" or 6) "failed to provide a full, fair, and adequate hearing."[226] If any of these determinations were made, the federal court would conduct a *de novo* trial.[227] In making such findings on issues of tribal law, the federal court was to "accord due deference" to the tribal court's interpretation "of tribal laws and customs."[228]

Senator Hatch's motivation for proposing these bills was "to check the tribal court power and to protect against civil rights abuses, especially when non-Indians were involved."[229] He apparently believed that tribal courts were little more than extensions of tribal councils, which, in his opinion, could not adjudicate fairly. He quoted extensively and approvingly from a federal court opinion describing the Crow Tribal Court as " 'a sort of "kangaroo court" [that] has made no pretense of due process or judicial integrity.' "[230] The concern of Hatch and other critics of

221. *See, e.g.*, Pommersheim & Pechota, *supra* note 84, at 576; Ziontz, *supra* note 125, at 26; C. L. Stetson, Note, *Tribal Sovereignty:* Santa Clara Pueblo v. Martinez: *Tribal Sovereignty 146 Years Later*, 8 AM. IND. L. REV. 139 (1980).

222. S. 517, 101st Cong., 1st Sess. (1989), and S. 2747, 100th Cong., 2nd Sess. (1988), respectively.

223. The claimant could be either an individual or "the Attorney General on behalf of the United States." S. 517 § 204(b).

224. S. 517 § 204(a)-(b).

225. *Id.*

226. S. 517 § 204(c).

227. *Id.*

228. S. 517 § 204(d).

229. Resnick, *supra* note 43, at 739 (citing 134 CONG. REC. S11654 (August 11, 1988)); Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919, 923 (D. Mont. 1988), *vacated*, 708 F. Supp. 1561 (D. Mont. 1989).

230. Resnick, *supra* note 43, at 740. Professor Resnick describes Senator Hatch's ex-

tribal courts is that those tribal courts do not operate in the same manner as the federal and state courts of the United States. Hatch's bills would have required the tribes' judicial process to "mirror" the federal one in order to gain validity.[231]

Although the Hatch bill has died,[232] a bill sponsored in the 102nd Congress by Senators Daniel Inouye and John McCain recognized the problem of enforcement of ICRA rights but addresses it through federal assistance to enhance tribal courts.[233] The Indian Tribal Court Act would assist tribes in developing and strengthening their judicial systems.[234] The bill's "Federal policy" statements reflect a view of tribal governments and their court systems as independent of and equal to their federal and state counterparts.[235] It expressly recognizes "tribal sovereignty and tribal court authority" and the need to "avoid[ ] encroaching on tribal traditions that may be manifested in tribal justice systems."[236] The bill also states that the act is not to be construed to "encroach upon or diminish in any way the inherent sovereign authority of tribal governments to enact and enforce tribal laws" nor to "imply that a tribal court is an instrumentality of the United States."[237]

Nevertheless, as stated in its declarations and findings, a primary

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tensive reference to *Little Horn State Bank*. That case involved a suit by the bank to obtain collateral (a forklift) from a defaulting Indian debtor.

231. *Id.* at 741.

232. The press for federal court review of tribal court decisions is by no means dead. Professor Newton reports that during the Congressional debates over the correction of *Duro v. Reina*, discussed *supra*, note 58, Senator Slade Gorton resisted, arguing that *Duro* was based on constitutional principles and could not be overruled. Senator Gorton also pressed "his belief that tribal court judgments should be reviewable in federal courts." Newton, *supra* note 58, at 115. In order to avoid a filibuster on the *Duro* legislation, the conference committee promised Senator Gorton it would hold hearings on federal review of tribal court decisions. *Id.* at 116. Those hearings were held on November 20, 1991. *Id.* (citing *Federal Court Review of Tribal Court Rulings in Actions Arising Under the ICRA and Draft Bill to Grant Jurisdiction to Federal Courts to Hear Final Actions from Indian Tribal Courts, Before the Select Comm. for Indian Affairs*, 102d Cong., 1st Sess. 14 (1991)).

233. The Indian Tribal Court Act, S. 1752, 102nd Cong., 2nd Sess. (1991).

234. These efforts are lauded by the United States Civil Rights Commission. U.S. CIVIL RIGHTS COMM'N, *supra* note 63, at 72.

235. *Id.*

236. Indian Tribal Court Act, § 3. The bill's "Purposes" section states the following:

> (1) The Federal Government shall assist tribal governments by strengthening tribal court systems and by promoting the recognition of tribal sovereignty and tribal court authority.
>
> (2) The Federal Government shall fund tribal courts at a level equivalent to State courts of general jurisdiction performing similar functions in the same or comparable geographic region.
>
> (3) Federal funding to tribal courts shall be administered in a manner that encourages flexibility and innovation by tribal justice systems and avoids encroaching on tribal traditions that may be manifested in tribal justice systems.
>
> (4) Federal funding shall be available to provide support to intertribal appellate court systems.
>
> (5) The United States shall provide funding for tribal justice systems in a manner that will minimize Federal and administrative costs.
>
> (6) As a matter of comity, full faith and credit shall be extended to the public acts, records, and proceedings of tribal courts, and tribal courts shall extend full faith and credit to the public acts, records, and proceedings of Federal and State courts.

Indian Tribal Court Act § 3.

237. Indian Tribal Court Act § 5.

motivation behind the bill is to enable individuals to vindicate ICRA rights.[238] To that end, the bill specifies that funds may be used:

> [T]o support studies of court rules and procedures, discovery devices, and evidentiary standards, to identify problems with the operation of such rules, procedures, devices, and standards, *to devise alternative approaches to better reconcile the requirements of due process under title II of . . . the Indian Civil Rights Act of 1968 . . . with the need for swift and certain justice*, and to test the utility of those alternative approaches.[239]

Implicit in this statement, of course, is that there are current deficiencies in tribal handling of ICRA claims, either through the tribal courts or administrative forums. Although the proposed bill does not address the use of the sovereign immunity defense directly, the above language implies that its sponsors intend tribal courts to assume jurisdiction over ICRA claims. This characterization of the bill's intent is not inconsistent with the bill's other references to tribal sovereignty. Tribal councils and courts that have not done so already must therefore face the question of whether they will continue to assert and uphold the sovereign immunity defense in ICRA actions.

IX. EMPLOYMENT PRACTICES THAT ARE COMPATIBLE WITH TRIBES' SELF-GOVERNANCE RIGHTS AND EMPLOYEES' ICRA RIGHTS

Economic development is fundamental to the ability of tribal nations to strengthen and maintain tribal sovereignty:

> Economic development in the Indian country has been a by-product of an Indian movement toward sovereignty, and sovereignty has meant being able to do what the Indian government decides to do and thus rendering the decisions of the federal courts, which had largely ignored the idea of Indian sovereignty as providing the Indians with any real political power, as close to irrelevant in the real world as possible.[240]

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238. The bill's "Declarations and Findings" section states:

> (1) The Federal Government has a government-to-government relationship with each federally recognized tribal government.
> (2) Tribal governments exercise powers of self-government, requiring the enactment of laws and the enforcement of such laws through tribal court forums.
> (3) The vindication of rights guaranteed by the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), and other Acts of Congress, within tribal forums can only by [sic] guaranteed by the provision of adequate resources to carry out the purposes and intent of that Act.
> (4) Such resources are needed to update tribal legal codes, to support probation and detention needs, to assure a right to counsel, and to increase tribal court access to legal authorities through computerized and other means, to train tribal court and tribal governmental personnel on court procedures and on the requirements of the Indian Civil Rights Act of 1968, to increase salaries of tribal court justices and other court personnel, and to retain law clerks.

Indian Tribal Court Act § 2.

239. Indian Tribal Court Act § 204(c)(10) (emphasis added).

240. Mohawk, *supra* note 25, at 499. *See also* WHITE, *supra* note 16, at 275-76 ("Communities . . . which secure a foothold in a real economy, have greater potential for true sovereignty now than at any time since their encounter with European immigrants. When they succeed economically, tribes repossess some of their original power and become sovereign in reality, not only by decree or legal definition."); Donald Wharton, *Tribal Considerations in*

A stable and cohesive tribal workforce is, in turn, key to tribal economic development.[241] It is not in tribes' best economic interests as sovereigns to subject their employees to employment practices and policies that are perceived by employees as unfair or arbitrary. Employees who perceive they or others have been treated unfairly are not likely to participate productively in the workforce or, for that matter, in tribal government as a whole.[242] Unfair treatment of tribal employees will deter outsiders from dealing with the tribe, for fear they will be treated no better.[243]

The due process and equal protection provisions of the ICRA, as interpreted under tribal law and applied to tribal employment, demand no more than fair treatment of employees by tribal governments.[244] A starting point is to fashion personnel policies that clearly enunciate standards of performance and behavior required of employees and include a procedure by which employees can grieve adverse personnel actions that comports with tribal due process. In most cases, proper administration of such a procedure should satisfy tribal due process obligations.[245] The Shoshone-Bannock Tribal Court explained the advantages of using a grievance procedure to resolve employment disputes:

> There are a number of valid policy reasons why a grievance process is beneficial to the Fort Hall community. An effective administrative process should be able to resolve personnel disputes in a timely, inexpensive, and informal manner. The development of such expertise within the community would become a valuable asset in the future for the whole of the tribe.[246]

Fair treatment also requires a forum for complaints of equal protection violations and failure to properly administer the grievance procedures, as well as a remedy for rights that have been violated.[247] The Shoshone-Bannock Tribal Court also explained the role of tribal courts in reviewing employee grievances as being limited "to ensur[ing] that

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Preparing for Financial Borrowing for Economic and Business Development, 199 (1991) *in* AMERICAN INDIAN RESOURCES INSTITUTE, SELECTED READINGS ON RESERVATION ECONOMIES ("The cultural and political survival of America's first nations is increasingly dependent upon their ability to redevelop the economies long ago destroyed by the invading europeans.").

241. WHITE, *supra* note 16, at 77 ("The Mississippi band avoided these problems [of managing federal funds] with clear and consistent financial, personnel and election policies.").

242. Pommersheim & Pechota, *supra* note 84, at 577. ("Tribal members who know that they have a certain remedy if they are not treated within the law will be more apt to participate in and be less critical of their own tribal government.") *See also* Mohawk, *supra* note 25, at 501 (opportunistic behavior of tribal officials "can go a long way to discouraging Indians from investing their resources in their own businesses and has historically discouraged people from supporting the Indian governments.").

243. Mohawk, *supra* note 25, at 501; Pommersheim & Pechota, *supra* note 84, at 577; Wharton, *supra* note 240, at 201.

244. *See supra* text accompanying notes 98-105.

245. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978) ("Non-judicial tribal institutions have also been recognized as competent law-applying bodies.").

246. Gonzalez v. Allen, 16 Indian L. Rep. 6048, 6050 (Shoshone-Bannock Tribal Ct. 1989).

247. *Id.*

the process was fairly conducted and that the reviewing board had sufficient evidence to support its decision."[248] In order to assure forums and remedies for such claims, however, tribes must waive sovereign immunity in tribal courts. As discussed previously,[249] tribes may tailor waivers of immunity to specific contexts and specific forums; accordingly, tribes can waive immunity narrowly in their courts to accommodate ICRA employment disputes.[250]

There are a number of safeguards tribes can employ to assure that such disputes do not overburden them. First, they can require, as a condition of employment, that all employees submit to tribal procedures and forums for the resolution of employment disputes. Some tribal codes contain a consent to jurisdiction clause that is triggered by employment with the tribe.[251] Such a condition to the employment contract would obviate the situation that arose in *Dry Creek Lodge*, where, because of a lack of a tribal forum, the Tenth Circuit allowed non-Indians to sue the tribe in federal court.[252] Thus, tribes would be assured of retaining jurisdiction over employment claims against their governments regardless of whether the employee is a tribal member. Second, tribes can require that employees exhaust administrative remedies through grievance procedures as a prerequisite to suit in tribal court. Again, a number of tribal codes currently require exhaustion as a prerequisite to jurisdiction in their courts.[253] Third, tribes could limit the remedy available for ICRA violations; in the employment context, such remedies could be limited to "make-whole" relief in the form declaratory judgments, injunctions and back pay for a limited period.[254] The Cheyenne River Sioux Court of Appeals suggested, in a wrongful termination case brought under the ICRA, that even though tribes are bound by the ICRA, tribal councils would not be prevented from devising "modest" remedies "that do not threaten to bankrupt or grind tribal government to a halt."[255] Finally, the proposed Indian Tribal Courts Act would allow tribes to satisfy ICRA obligations through use of alter-

248. *Id.*

249. *See supra* text accompanying notes 127-61.

250. *See* Ziontz, *supra* note 125, at 26, for a discussion of use of limited waivers to meet the ICRA obligations.

251. *See, e.g.*, STATUTES OF THE NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS ch.3, preamble, § 3; CONST. AND BYLAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION ch. 1, § 1.1(a).

252. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).

253. *See, e.g.*, CONST. AND BYLAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION ch. 2, § 20.1(a).

254. Prior to the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C.A. § 1981 (West Supp. 1992)), relief in federal employment discrimination cases under Title VII was limited to declaratory, injunctive and limited back pay relief.

255. Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6108-09 (Cheyenne River Sioux Ct. App. 1988). *See also* Pommersheim & Pechota, *supra* note 84, at 578 ("there might be a very modest ceiling on money judgments and cautious injunctive guidelines which limit the ability to interfere with important governmental functions"); Pommersheim, *supra* note 8, at 66.

native dispute resolution.[256] Such techniques may be more compatible than litigation considering tribes' traditional methods of handling disputes.[257] Alternative dispute resolution would be particularly appropriate for handling employment disputes that occur during an on-going employment relationship and that do not involve discharges.[258]

Accommodation by tribal nations of their employees' due process and equal protection rights in employment will gain them much more than it will cost in terms of sovereignty. For the price of developing fair personnel policies and procedures and opening their courts to ensure ICRA rights, tribes will strengthen their sovereign rights in two important ways. First, they will have taken an affirmative step to prevent further congressional erosion of sovereignty through oversight of ICRA matters, and, second, they will have gained a more committed and loyal workforce that will provide a solid foundation for tribal government and commerce. Tribal nations with strong governments and economies will be best able to protect their sovereignty.

256. S. 1752, 102nd Cong., 1st Sess. § 204(c)(3), (13) (1991).

257. *See, e.g.*, Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

258. Alternative dispute resolution has been used successfully in handling employment disputes in United States government and industry. *See, e.g.*, ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (1988).